

LEE CHENG YEE

a

v.

TIU SOON SIANG & ANOR

COURT OF APPEAL, KUALA LUMPUR

b

MOKHTAR SIDIN JCA

PAJAN SINGH GILL JCA

RAHMAH HUSSAIN JCA

[CIVIL APPEAL NO: C-02-42-1998]

19 SEPTEMBER 2003

c

CIVIL PROCEDURE: *Pleadings - Limitation - Whether must be specifically pleaded - Whether defendants could still rely on defence of limitation if not pleaded beforehand - When must limitation be pleaded - Whether only when limitation is not absolute - Whether limitation period prescribed by s. 7(5) Civil Law Act 1956 absolute*

d

LIMITATION: *Pleading - Fatal accident - Whether limitation must be specifically pleaded - Whether defendants could still rely on defence of limitation if not pleaded beforehand - When must limitation be pleaded - Whether only when limitation is not absolute - Whether limitation period prescribed by s. 7(5) Civil Law Act 1956 absolute - Plaintiff's action brought more than three years after death*

e

DAMAGES: *Fatal accident - Loss of earnings - Lost years - Whether allowable if deceased unemployed at time of death - Evidence respecting deceased's personality and vocation - Civil Law Act 1956, s. 8*

f

The two principal issues that arose for decision in this short appeal were: (i) whether the defence of limitation has to be pleaded before it can be relied upon by a defendant; and (ii) whether a claim on behalf of the estate of a deceased person for loss of earnings (for the deceased's 'lost years') is allowable if the deceased was unemployed at the time of his death.

g

Held (dismissing the appeal):

Per Pajan Singh Gill JCA

[1a] The cause of action arose on 13 March 1983. Hence, the plaintiff's action – which was filed on 13 January 1989 – was filed outside the three-year time-limit prescribed by s. 7(5) of the Civil Law Act 1956 ('CLA'). (pp 3 h & 4 a)

h

i

- a** [1b] Although the defence of limitation was not specifically pleaded, the defendants could still rely on limitation to resist the plaintiff's claim. This was because the terms of s. 7(5) CLA are absolute and contain no exceptions. It is only where limitation is not absolute, such as under the Limitation Act 1953, that the defence of limitation has to be pleaded.
- b** (Following *Kuan Hip Peng v. Yap Yin & Anor* [1965] 31 MLJ 212 FC.) The trial judge was thus right in holding that the plaintiff's claim must fail. (p 5 b-g)
- c** [2] There was a paucity of evidence on the personality of the deceased; it was uncertain whether she was, or would have become, a consummate career-woman. The trial judge was thus right in not making any award for loss of earnings for the deceased's 'lost years'. (p 7 a-b)

[Bahasa Malaysia Translation Of Headnotes]

- d** Dua isu penting yang berbangkit dalam rayuan pendek di sini adalah: (i) sama ada pembelaan penghadan perlu dihidang sebelum seseorang defendan boleh bergantung kepadanya; dan (ii) sama ada suatu tuntutan yang dibuat bagi pihak estet seorang si mati bagi kehilangan pendapatan (untuk 'tahun-tahun yang hilang' si mati) boleh dibenarkan jika si mati tidak bekerja semasa kematiannya.
- e** **Diputuskan (menolak rayuan):**
Oleh Pajan Singh Gill HMR
- f** [1a] Kausa tindakan berbangkit pada 13 Mac 1983. Oleh kerana itu, tuntutan plaintif - yang difail pada 13 Januari 1989 – telah difail diluar had masa tiga tahun seperti yang diperuntukkan s. 7(5) Akta Undang-Undang Sivill 1956 ('CLA').
- g** [1b] Walaupun pembelaan penghadan tidak dihidang secara spesifik, defendan masih boleh bergantung kepada penghadan bagi menghadapi tuntutan plaintif. Ini kerana terma-terma s. 7(5) adalah muktamad selain tidak mengandungi apa-apa kecualian. Ianya hanyalah di mana penghadan tidak muktamad, seperti di bawah Akta Penghadan 1953, bahawa pembelaan penghadan perlu dihidang. (Mengikuti *Kuan Hip Peng lwn. Yap Yin & Anor* [1965] 31 MLJ 212 FC). Hakim bicara dengan itu betul bilamana memutuskan bahawa tuntutan plaintif seharusnya gagal.
- h** [2] Wujud kekontangan keterangan mengenai keperibadian si mati; tidak dapat dipastikan sama ada beliau merupakan seorang, atau akan menjadi seorang wanita berkarier yang sempurna. Hakim bicara dengan itu betul dalam tidak membuat apa-apa award bagi kehilangan pendapatan untuk 'tahun-tahun yang hilang' si mati.
- i**

Case(s) referred to:

Chan Heng Wah & Anor v. Peh Thiam Choh & Anor [1988] 1 MLJ 74 (*dist*)
Kuan Hip Peng v. Yap Yin & Anor [1965] 31 MLJ 212 (*fol*)

Legislation referred to:

Civil Law Act 1956, ss. 7(5), 8

For the appellant - Bastian P Vendargon; M/s Vendargon & Partners
For the respondent - Jagjit Singh; M/s Jagjit Singh & Co

[Appeal from High Court, Kuantan; Suit No: 23-4-1989]

Reported by Gan Peng Chiang

JUDGMENT**Pajan Singh Gill JCA:**

The matters that confront us in this appeal are basically on the issue of limitation, whether in not pleading it in certain instances, a party is disentitled to raise the defence of limitation, and whether a claim on behalf of the estate of a deceased person for loss of earnings for the 'lost years' of a deceased, is allowable, if the deceased was unemployed at the time of death.

The administrator of the estate of Chia Miew Hien, one Lee Cheng Yee, brought a suit for negligence against the 1st and 2nd defendants, owner and driver of motor lorry bearing registration number TD 9278. As a result of the alleged negligence of the 2nd defendant, the deceased Chia Miew Hien suffered massive injuries in a motor accident and died instantly.

On pursuing the notes of evidence and the grounds of judgment we note that at the trial learned counsel for the respondent/defendant had conceded to total liability.

It was the contention of the respondent/defendant before the trial judge, and even before us, that the appellant/plaintiff's reliefs were crafted under s. 7 of the Civil law Act 1956. We wish to interpose at this stage to say that, the accident took place on 13 March 1983, and therefore the Civil Law (amendment) Act 1984 which came into effect on 1 October 1984, does not apply to this case.

Hence, it was the argument of the respondent/defendant's counsel that since the cause of action arose in 1983, and it was a dependency claim, one must be guided by s. 7 of the Civil Law Act 1956, more in particular s. 7(5) of the said Act which reads as follows:

- a* Not more than one action shall be brought for and in respect of the same subject matter of complaint if, **and every such action shall be brought within three years after the death of such deceased person.** (emphasis added)

In connection with the present case it was the submission of the respondent/defendant's counsel that the suit was only filed on 13 January 1989, some five years after the death of the deceased in question.

- b*
- In his riposte, the appellant/plaintiff's counsel submitted that the issue of limitation was not specifically pleaded in the defence of the respondent, and neither was a request made that the matter be set down as a preliminary issue.
- c* As such, it was his submission that the respondent is not entitled to rely on the limitation to defeat the claim.

- We would in principle have been persuaded by this submission, but for the timely intervention of the respondent's counsel who drew our attention to the case of *Kuan Hip Peng v. Yap Yin & Anor* [1965] 31 MLJ 212. The brief facts of the case were that the plaintiff who in fact was suing by his next friend was claiming compensation under s. 7 of the Civil Law Ordinance for loss arising from the death of his father as a result of the alleged negligent driving of a motor vehicle owned by the first defendant and driven by the second defendant. The alleged negligent driving occurred on 22 November 1960 and the plaintiff's father died on 23 November 1960.

- d*
- e*
- A writ was issued on 27 November 1963, ie, four days after the expiry of the period of three years in contravention of s. 7(5) of the Civil Law Ordinance. No defence was filed by the defendants, but on 27 January 1964, the defendants took out a summons under O. 25 r. 4 for an order that all proceedings in the action be stayed on the ground that it was frivolous, vexatious, and an abuse of court process. The application was supported by an affidavit stating, "The action commenced by the writ of summons herein must necessarily fall because it was not brought within three years after the death of the deceased person in question."

- f*
- g* The application came before Hashim J (as he then was) who adjourned it into open court for hearing, and in the event, made an order that the plaintiff's suit be dismissed.

- h* On appeal to the Federal Court, Thompson LP in dismissing the appeal had this to say:

- Now it is clear from the general course of reasoning upon which it is based and from the reference to the Real Property Limitation Acts that the case of *Dismore v. Milton*, *supra*, has no application in relation to a Statute of Limitations which is absolute and without exceptions.

i

Where there are exceptions which would affect the operation of the statute it is clear that a plaintiff need not plead them until the defence of limitation has been raised on the pleadings by the defendant (see *Dawkins v. Penrhyn*, *supra*; *Busch v. Stevens*).

a

But that is not the position in the present case. The terms of section 7(5) of the Civil Law Ordinance are absolute and contain no exceptions. They are that “such action shall be brought within three years after the death of the deceased person”. It is true that, as Goddard L.J. said with reference to the corresponding section of the English Act, the section “merely prescribes a period of limitation” (*Lubovsky v. Snelling*) and that it does not contain a condition precedent or anything of the sort. Nevertheless the period is absolute. There is no room for doubt as to when it begins to run. It runs from the death of the person of whose support the plaintiff has been deprived. The cause of action arises on death (see *Seward v. “Vera Cruz”*). There are none of the saving provisions in favour of a plaintiff that were found in the Statute of James I and are to be found today in the English Limitation Act of 1939 or our own Limitation Ordinance of 1953. There is no question of infancy or disability or anything of the sort or of acknowledgment. The only way in which the consequences of the section could be avoided would be if there had been some agreement not to plead the statute and this would constitute a new cause of action (*Lubovsky v. Snelling*, *supra*) and would require to be set out in the Statement of Claim.

b**c****d**

Finally, there can be no question of importing into the matter any of the saving provisions of the Limitation Ordinance by any process of construction for by section 3 of that Ordinance it “shall not apply to any action ... for which a period of limitation is prescribed by any other written law.

e

In regard to the issue at hand, we are guided by the *dicta* of Thompson LP in the case of *Kuan Hip Peng (supra)* that the plea of limitation need only be pleaded where limitation is not absolute, such as under the Limitation Act 1953. It would not apply to a Statute of Limitation which is absolute, and without exception. In this case, we find that s. 7(5) of the Civil Law Act 1956, and equally s. 7(5) Civil Law Act (as amended in 1984) are absolute in nature. Hence, there is no necessity to plead limitation.

f**g**

The learned trial judge we hold was correct in holding that the claim under s. 7 Civil Law Act 1956 must fail.

In respect of the claim under s. 8 of the Civil Law Act, the bone of contention was that the deceased was unemployed at the time of her death, and as such whether the estate was able to claim loss of earnings for the ‘lost years’ of the deceased.

h**i**

- a* The deceased's husband in evidence at the trial gave a glowing account of his wife's (the deceased) credentials. The deceased was an Applied Science graduate who majored in Computer Science, and on her return to Malaysia was employed in Singapore for a few months in August 1981 as a Computer Programmer by the firm of United Engineers (Singapore) Pte. Ltd. She was paid a monthly salary of Singapore \$1,000. She stopped work on 15 February 1982 when she was retrenched because of the recession in Singapore. It was admitted in evidence by the husband of the deceased that the averment in para. 8 of the statement of claim that the deceased was employed as a Computer Programmer at the time of her death was an inexactitude. The witness alluded at some stage of his evidence, to the fact that his wife had actually given up her job in Singapore to start a family, and at the time of her death, they had a child of 3 1/2 months old. Again, this evidence we feel, should be viewed with caution, as the witness eventually admitted the deceased was retrenched from her job.

- d* The appellant's counsel tried to prevail on us, that it was not fatal to the claim for "lost years", that the deceased was unemployed, as there was sufficient evidence before the trial court, that with the deceased's expertise, and qualifications she would have eventually been able to secure employment. The period of unemployment brought about by the recession in Singapore was a momentary hiccup, to a possibly bright career. There was, counsel submitted, a real prospect of an ability, and opportunity, to earn on the part of the deceased, to support the claim.

- f* Much as we sympathize with the valiant efforts of the appellant's counsel to impress upon us this point, we cannot with certainty say at this juncture, what the deceased's career prospects were going to be, would she have gone back to the work force after the birth of her child, or would she have grown to enjoy the bliss of being a home maker.

- g* In the case of *Chan Heng Wah & Anor v. Peh Thiam Choh & Anor* [1988] 1 MLJ 74 that was cited by appellant's counsel to support his argument on this issue, with respect, in this particular instance at the time of the death of the deceased who was aged 20, evidence was adduced at the trial that she was a second year medical student in the National University of Singapore, had very good 'O' and 'A' Level results, was awarded a government scholarship to study medicine at the University, and was bonded to work for the Government for eight years upon completion of her medical studies. At the date of the accident, she had completed her first year examination, and her results were of average standard. Based on the evidence adduced, the learned trial judge quite rightly found that the deceased in this case would have qualified as a Doctor, and went on to assess the net prospective earnings of the deceased.
- i* This approach of the trial judge was affirmed on appeal.

As we stated a moment ago, earlier, we found a paucity of evidence on the personality of the deceased, and whether in fact she was a consummate career woman or otherwise. Some other evidence of perhaps persons acquainted with the deceased, or references from previous employers, would have served as an index of her personality, and helped us in our assessment. In vain, there was little of this to work on. There is we find too much of guesswork and speculation expected of us, that we as judges should refrain from engaging in.

We are thus not inclined to make any award in this respect, and to that end uphold the ruling of the trial judge, who dismissed this particular head of damages.

The appeal was dismissed with no order as to costs.

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